

APR 2004

TERM

STATE OF MICHIGAN  
IN THE SUPREME COURT

ELAINE A. HAAS and CHARLES J. BANNON,  
Plaintiffs/Appellees,

Supreme Court  
No. 123144

Court of Appeals  
No. 230490

v.

Wayne County Circuit  
Court No. 99-918983-CH  
Hon. Michael J. Callahan

WADE H. DEAL and SARAH J. DEAL,  
TRACEY L. DEAL and J.A. DELANEY & CO.,  
a Michigan corporation, jointly and  
severally,

Defendants/Appellants.

---

LAURIE S. LONGO (P42203)  
Attorney for Plaintiff-Appellants  
214 S. Main St.  
Ann Arbor, MI 48104  
(734) 913-5619

CLARK HILL, PLC  
BY: RICHARD A. SUNDQUIST (P31535)  
Co-Counsel for Plaintiffs-Appellants  
500 Woodward Ave., Suite 3500  
Detroit, MI 48226-3435  
(313) 965-8227

CUMMINGS, MCCLOREY, DAVIS &  
ACHO, P.L.C.  
BY: TIMOTHY YOUNG (P22657)  
GAIL P. MASSAD (33001)  
Attorneys for Defendants-Appellees,  
Wade H. Deal and Sarah J. Deal  
33900 Schoolcraft  
Livonia, MI 48150  
(734) 261-2400

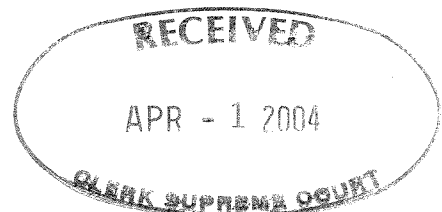
WOOD, KULL, HERSCHFUS, LAY & KULL  
BY: BRIAN H. HERSCHFUS (P41567)  
Attorneys for Defendants-Appellees,  
J. A. Delaney & Co. and Tracey Deal  
37000 Grand River Ave., Suite 290  
Farmington Hills, MI 48335-2881  
(248) 476-2000

SEYBURN, KAHN, BESS, DEITCH &  
SERLIN, P.C.  
BY: GORDON S. GOLD (P14087)  
Co-Counsel for Defendant/Appellee Tracey L. Deal  
2000 Town Center, Suite 1500  
Southfield, MI 48075  
(248) 353-7620

---

DEFENDANT/APPELLANTS' REPLY BRIEF

PROOF OF SERVICE



## TABLE OF CONTENTS

INDEX OF AUTHORITIES .....	i
INTRODUCTION .....	1
LAW AND ARGUMENT .....	3
RELIEF REQUESTED .....	9

## INDEX OF AUTHORITIES

### PAGE

#### CASES

<i>Haas v Deal</i> , 469 Mich 969; 673 NW2d 751 (2003) .....	6
<i>Hi-Way Motor Co v Int'l Harvester Co</i> , 398 Mich 330; 247 NW2d 813 (1976) .....	7
<i>Kamalnath v Mercy Memorial Hospital Corp</i> , 194 Mich App 543; 487 NW2d 499 (1992) .....	7
<i>Law Offices of Lawrence J Stockler, PC v Rose</i> , 174 Mich App 14 (1989) .....	4
<i>McMullen v Joldersma</i> , 174 Mich App 207; 435 NW2d 428 (1988) .....	7, 8
<i>Nieves v Bell Industries, Inc</i> , 204 Mich App 459; 517 NW2d 235 (1994) .....	4, 5
<i>Novak v Nationwide Mutual Ins Co</i> , 235 Mich App 675; 599 NW2d 546 (1999) .....	4
<i>State-Williams Partnership v Gale</i> , 169 Mich App 170; 425 NW2d 756 (1988) .....	4
<i>Strawn v Canuso</i> , 657 A2d 420 (1995) .....	7
<i>Webb v Malmquist</i> , 195 Mich App 470; 491 NW2d 851 (1992) .....	4, 5

#### STATUTES

MCL § 339.2517(2) .....	4
MCL § 565.957 .....	6, 7

## INTRODUCTION

In their Brief on Appeal, Plaintiffs spend approximately 15 pages reiterating all of the "hotly contested" facts of this case. However, the majority of the facts Plaintiffs cite in support of their case relate to Tracey Deal, the real estate agent, who is not a party to this appeal. This appeal involves only the claims against WADE AND SARAH DEAL, the sellers of the home at issue.

For example, Plaintiffs claim that Wade and Sarah Deal mislead the Plaintiffs and that their "advertising and misrepresentations regarding the wooded lot were intended to induce Plaintiffs to purchase the Fairbrook home." (Plaintiffs' Brief on Appeal, p 22). However, Plaintiffs attempt to support this claim against Defendants Wade and Sarah Deal by stating that the home was advertised as "[s]ecluded Midst (sic) Nature's Wonders," and "[w]atch deer, birds, and all kinds of wildlife right from your own kitchen." (Plaintiffs' Brief on Appeal, p 2). Plaintiffs inappropriately attribute this advertisement to Mr. and Mrs. Deal, despite the fact that there is no evidence that Mr. and Mrs. Deal created this advertisement. To the contrary, the advertisement was created and published by the Co-Defendants, who are not parties to this appeal.

Nevertheless, the Plaintiffs Brief on Appeal supports the fact that this advertisement was not misleading. Plaintiffs admit that the home is "set among gently rolling hills on a secluded, beautifully wooded 2.66 acres with access to two private ponds and abundant wildlife." (Plaintiffs' Brief on Appeal, p 1). This has not changed since the Plaintiffs purchased the home: it is still located on a secluded, beautifully wooded 2.66 acres of land and the Plaintiffs still have access to two private ponds, as well as abundant wildlife on their property. Therefore, there was no false advertising by the Defendants.

Plaintiff also complains that Tracey Deal misrepresented the fact that she was representing Wade and Sarah Deal as a seller's agent, and that Plaintiffs believed that Tracey Deal was acting as a buyer's agent. Again, this information is irrelevant to the Plaintiffs' claims against the sellers, Wade and Sarah Deal.

Likewise, Plaintiffs assert that Defendants Wade and Sarah Deal should somehow be liable where Tracey Deal, the real estate agent, allegedly found out information about the cemetery and failed to inform the Plaintiffs. For instance, Plaintiffs allege that the Deals knew about the expansion plans sometime on October 1, 1998. In support of this allegation, Plaintiffs rely solely on evidence attributable to Tracey Deal, not Wade and Sarah Deal. (Plaintiffs' Brief on Appeal, pp 9-10). Plaintiff claims that Tracey Deal had allegedly been told that the woods behind the property belonged to the cemetery, and that Tracey Deal had been questioned by another prospective buyer of the house regarding the cemetery's property and plans to expand. (Plaintiffs' Brief on Appeal, p 10). An affidavit submitted by the other prospective buyer confirms that the information regarding the cemetery was given only to Tracey Deal, not Wade or Sarah Deal. (Apx. p 124-126a). Furthermore, Mr. Haas specifically testified that he was not aware that Tracey told Wade and Sarah Deal about the information she obtained:

Q. I'm asking whether you have any information, knowledge or evidence that Wade and Sarah Deal knew about the potential expansion of the cemetery on October 1, 1997 (sic), when they signed a seller's disclosure statement.

A. No, I don't.

\* \* \*

Q. Okay, and then lastly, any information, knowledge or evidence that the real estate agent you referred to . . . [e]ver told Wade or Sarah Deal about the potential expansion of the cemetery?

A. No. (Apx. pp 48a, 52a).

Furthermore, Plaintiffs claim that on October 5, 1998, Tracey Deal told them "that Rural Hill Cemetery was located in the area and might expand. . . . [But] they would never be able to see the cemetery from their property." (Plaintiffs' Brief on Appeal, p 5). Plaintiffs admit, however, that they never questioned Wade Deal about Tracey's comments regarding the cemetery's construction, "because they had believed her . . . ." (Plaintiffs' Brief on Appeal, p 6). Further, the Plaintiffs have no evidence that the real estate agent told Mr. and Mrs. Deal what she found out about the cemetery. Therefore, any misrepresentation or reliance on the statements regarding the cemetery's expansion is attributable to statements made by the real estate agent, not Wade and Sarah Deal.

### **LAW AND ARGUMENT**

#### **I. PLAINTIFFS' CLAIMS OF FRAUD AND MISREPRESENTATION WERE APPROPRIATELY DISMISSED AGAINST DEFENDANT SARAH DEAL BECAUSE PLAINTIFFS DID NOT PRODUCE ANY EVIDENCE TO ESTABLISH THAT SARAH DEAL MADE ANY REPRESENTATIONS OF ANY KIND TO THE PLAINTIFF.**

Plaintiffs allege that, even though they admittedly never met with or spoke to Sarah Deal prior to the purchase of their home, Sarah Deal is equally as liable because she "reaped the benefits of her husband and daughter-in-law and, to the extent that Tracey Deal made such misrepresentations while she was acting as the Deal's seller's agent, those misrepresentations must be imputed to both Wade and Sarah Deal." (Plaintiffs' Brief on Appeal, p 20). However, Plaintiffs fail to recognize the fact that the Court of Appeals held that Tracey Deal was acting as a dual agent, not as a seller's agent. (Apx. p 19a).

Specifically, the Court of Appeals held that "[i]n the present case, Tracey did not have a duty to disclose all information to plaintiffs because she was acting as a dual agent." (Apx. p 19a). Therefore, as a dual agent, the alleged misconduct of Tracey Deal cannot be imputed to

either party. See MCL § 339.2517(2).

Based on the lack of evidence presented with regard to Sarah Deal, it is clear that the Plaintiffs failed to state a claim of fraud. Plaintiffs were unable to establish any of the elements necessary to prove a claim of fraud against Sarah Deal because she made no statements, never met the Plaintiffs, and did not even attend the closing. Accordingly, the trial court's granting of Defendant Sarah Deal's Motion for Summary Disposition should be affirmed.

**II. PLAINTIFFS' CLAIMS OF FRAUD BASED ON FALSE REPRESENTATION AND INNOCENT REPRESENTATION WERE APPROPRIATELY DISMISSED BY THE TRIAL COURT BECAUSE PLAINTIFFS' RELIANCE UPON WADE DEAL'S ALLEGED STATEMENT WAS UNREASONABLE.**

It has been clearly established that reliance upon a misrepresentation must be reasonable. *Novak v Nationwide Mutual Ins Co*, 235 Mich App 675, 689-91; 599 NW2d 546 (1999); *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994); *Webb v Malmquist*, 195 Mich App 470, 474-75; 491 NW2d 851 (1992); *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 30 (1989); *State-Williams Partnership v Gale*, 169 Mich App 170, 179; 425 NW2d 756 (1988). See also Defendants argument I, section B(6) and case law set forth in Defendants' Brief on Appeal. Therefore, reasonable reliance is an essential element to both a claim of fraudulent misrepresentation as well as a claim of innocent misrepresentation. Furthermore, "[a] person who *unreasonably* relies on false statements should not be entitled to damages for misrepresentation." *Novak, supra* at 690.

Plaintiffs' reliance in this matter was unreasonable as a matter of law for several reasons. First, reliance upon WADE DEAL's alleged statements would have been impossible because the alleged statements were made 20 days after the Offer to Purchase was made by the Plaintiffs and accepted by the DEALs. Plaintiffs' Complaint specifically alleges that the Offer to Purchase was

made on October 1<sup>st</sup>, and the alleged misrepresentations by WADE DEAL occurred on October 25<sup>th</sup>. Therefore, Plaintiffs could not have relied upon WADE DEAL's statements when deciding to purchase the property.

Furthermore, the Plaintiffs admit that WADE DEAL did not know for certain who owned the vacant parcel of property. The Plaintiffs' own pleadings state that WADE DEAL said he "thought" the property was owned by the Township. (Appendix p. 110a, ¶61).

### **III. THE COURT OF APPEALS ERRONEOUSLY REVERSED THE DISMISSAL OF PLAINTIFFS' FRAUD CLAIM BECAUSE PLAINTIFFS HAD THE MEANS TO DETERMINE THAT WADE DEAL'S OPINION REGARDING THE OWNERSHIP OF THE VACANT LAND WAS NOT ACCURATE.**

Not only does a fraud or misrepresentation claim require reasonable reliance on a false representation, "there can be no fraud where a person has the means to determine that a representation is not true." *Nieves, supra* at 464; (emphasis added). *See also Webb, supra* at 474.

In the case at bar, it is clear that the Plaintiffs had the means to determine the ownership of the adjacent vacant parcel of land and the expansion plans of the cemetery. In fact, the Plaintiffs admit that all that was required to determine the owner of the property was to ask at the Northville Township office while they were there on another errand. (Plaintiffs' Brief on Appeal, p 7). When the Plaintiffs were made aware of the possible cemetery expansion on the day they signed the purchase agreement, they could have gone to the Township office and requested the information. Instead, the Plaintiff's chose to rely on a third party's opinion as to the ownership of a vacant parcel of land, rather than conduct their own investigation into the true ownership of the land. Not only does this constitute an unreasonable reliance on Mr. Deal's statement of opinion, the Plaintiffs cannot claim to have been defrauded where they had



information available to them that they chose to ignore.

**IV. PLAINTIFFS ATTEMPT TO ARGUE THAT DEFENDANTS WERE REQUIRED TO DISCLOSE THE LOCATION OF THE CEMETERY UNDER THE SELLER DISCLOSURE ACT, DESPITE THE FACT THAT THE COURT OF APPEALS HELD TO THE CONTRARY AND THIS COURT DENIED THEIR APPLICATION FOR LEAVE TO APPEAL THIS ISSUE.**

In support of its argument that the Plaintiffs' reliance on the statements of WADE DEAL were reasonable, Plaintiffs attempt to re-argue their claim that Defendants were required to disclose the location of the cemetery under the Seller Disclosure Act, MCL § 565.957. (Plaintiffs' Brief on Appeal, pp 30-33). Plaintiffs claim that "[t]he issue of whether a buyer's reliance is reasonable or justified is intimately tied to the issue of whether the law recognizes a duty in the seller to disclose . . . ." (Plaintiffs' Brief on Appeal, p 30). Plaintiffs' arguments, however, are meritless.

Plaintiffs argue that "every seller of residential real estate is under a statutory duty to disclose certain categories of conditions occurring on nearby property." (Plaintiffs' Brief on Appeal, p 30). Specifically, Plaintiffs argue that cemeteries fall under the "etc." category of the statute. This issue, however, has already been addressed by the Court of Appeals, and this Court specifically denied Plaintiffs' Application for Leave to Appeal this issue.

The Court of Appeals in this case clearly determined that the term "etc." was not intended to include cemeteries, and therefore the DEALS were under no duty to disclose the existence of a cemetery. (Apx. 19-20a). The Plaintiffs sought leave to appeal this exact issue, which was denied by this Court. *Haas v Deal*, 469 Mich 969; 673 NW2d 751 (2003). Therefore, since the Plaintiffs have not been granted leave to appeal the holding of the Court of Appeals on this issue, the requirements of the Sellers' Disclosure Act are not at issue in this matter and should not be considered by this Court.

Nevertheless, Plaintiffs erroneously rely on the decision in *Strawn v Canuso*, 657 A2d 420, 431 (1995). The Strawn case involved the concealment of the location of a nearby landfill. In Michigan, information about off-site conditions and/or activities are governed by the Seller Disclosure Act, MCL § 565.957, which specifically required the disclosure of landfills. The Act does not, however, require the disclosure of cemeteries. Therefore, by law there is no legal duty to disclose the existence of a nearby or adjacent cemetery. As such, Mr. and Mrs. Deal had no duty to disclose the location of the cemetery or the future expansion plans.

As stated above, the Court of Appeals specifically determined that the Defendants did not have a duty to disclose the location of the cemetery. Therefore, since the law does not recognize a duty in the seller to disclose this condition, the buyer's reliance was not justified.

**V. THE COURT OF APPEALS ERRED IN REVERSING DISMISSAL OF PLAINTIFFS' FRAUD CLAIM AGAINST WADE AND SARAH DEAL WHERE THE ALLEGED REPRESENTATIONS REGARDING THE PROPOSED EXPANSION OF THE CEMETERY RELATE TO A FUTURE EXPECTATION.**

It is well-settled that an action for fraud cannot be based upon alleged fraudulent representations or omissions regarding a future activity. *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976); *Kamalnath v Mercy Memorial Hospital Corp*, 194 Mich App 543, 554; 487 NW2d 499 (1992); *McMullen v Joldersma*, 174 Mich App 207, 216; 435 NW2d 428 (1988). An action for fraudulent misrepresentation must be predicated upon a statement relating to a past or an existing fact. *Kamalnath, supra*.

The case of *McMullen v Joldersma, supra*, is directly on point to the case at bar. In *McMullen*, the plaintiffs sued the defendants after they bought a store from the defendants. The buyers alleged fraud, claiming that the sellers failed to disclose plans concerning a highway bypass that would divert traffic away from the store at issue. *Id.* at 210. The Court of Appeals

held that the plaintiffs' argument had no merit, because the alleged fraud was based upon a future activity. *Id.* at 214. Specifically, the Court held that the testimony clearly established that approval for the project was still ongoing at the time the plaintiffs purchased the store. *Id.* As a result, the fraud involved a future event, and was therefore not actionable. Furthermore, the Court determined that the information regarding the future plans of the bypass was a matter of public record, and that "[a] reasonable inquiry would have revealed the existence of the bypass project." *Id.* at 216.

Similarly, in the case at bar, the Plaintiffs have asserted that the Defendants are liable for failing to disclose the expansion plans of the cemetery. However, at the time of the sale of the Defendants' property at issue, the evidence and testimony clearly establish that approval for the project was still ongoing up to a year after the Plaintiffs purchased the property. (Apx. pp 162-163a). In September of 1999, the expansion was still referred to as a "proposed" expansion. (Apx. p 164a). In May of 2000, a newspaper article indicated that the Northville Planning Commission was not expected to consider a zoning recommendation for the proposed expansion until June or July of 2000. (Apx. p 166a).

Based upon the evidence presented, the proposed expansion of the cemetery clearly constitutes an uncertain, future event or expectation, which cannot be the basis of a fraud claim as a matter of law. Accordingly, the trial court's decision dismissing Plaintiffs' fraud claim against Defendants Wade and Sarah Deal should be affirmed.

#### **VI. PLAINTIFF'S ARGUMENT REGARDING THEIR CLAIMS OF SILENT FRAUD SHOULD BE DISREGARDED BY THIS COURT.**

Plaintiffs attempt to argue that the trial court erred in granting Defendants' Motion for Summary Disposition as to Plaintiffs' claim of silent fraud against Wade Deal. (Plaintiffs' Brief

on Appeal, pp 37-40). However, this Court specifically denied Plaintiffs' Application for Leave to Appeal on this issue. Accordingly, this Court should not consider Plaintiffs' claim of silent fraud which has already been dismissed.

**RELIEF REQUESTED**

WHEREFORE, the Defendant/Appellants, WADE and SARAH DEAL respectfully pray this Honorable Court enter an Order affirming the trial court's grant of summary disposition to the Defendant/Appellants, WADE and SARAH DEAL, and reverse the Opinion of the Court of Appeals as it relates, in part, to the reversal of the grant of summary disposition to the Defendant/Appellants, WADE and SARAH DEAL and to grant such other and further relief as justice and equity require in this matter.

Respectfully submitted,

**CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C.**

BY: 

**TIMOTHY YOUNG (P22657)**

**GAIL P. MASSAD (P33001)**

33900 Schoolcraft Road

Livonia, Michigan 48150

(734) 261-2400

Attorneys for Defendants/Appellants

WADE H. DEAL and SARAH J. DEAL

Dated: April 1, 2004

/home/kmh/haas.reply.supct

STATE OF MICHIGAN  
IN THE SUPREME COURT

ELAINE A. HAAS and CHARLES J. BANNON,

Plaintiffs-Appellees,

v

WADE H. DEAL and SARAH J. DEAL,  
TRACEY L. DEAL and J.A. DELANEY & CO.,  
a Michigan corporation, jointly and severally,

Defendants-Appellants.

Supreme Court  
No. 123144

Court of Appeals  
No. 230490

Wayne County Circuit Court  
No. 99-918983-CH  
Hon. Michael J. Callahan

---

LAURIE S. LONGO (P42203)  
Attorney for Plaintiff-Appellees  
214 S. Main St.  
Ann Arbor, MI 48104  
(734) 913-5619

CLARK HILL, PLC  
BY: RICHARD A. SUNDQUIST (P31535)  
Co-Counsel for Plaintiffs-Appellees  
500 Woodward Ave., Suite 3500  
Detroit, MI 48226-3435  
(313) 965-8227

---

CUMMINGS, MCCLOREY, DAVIS & ACHO, P.L.C.  
BY: TIMOTHY YOUNG (P22657)  
GAIL P. MASSAD (33001)  
Attorneys for Defendants-Appellants,  
Wade H. Deal and Sarah J. Deal  
33900 Schoolcraft  
Livonia, MI 48150  
(734) 261-2400

WOOD, KULL, HERSCHFUS, LAY & KULL  
BY: BRIAN H. HERSCHFUS (P41567)  
Attorneys for Defendants,  
J. A. Delaney & Co. and Tracey Deal  
37000 Grand River Ave., Suite 290  
Farmington Hills, MI 48335-2881  
(248) 476-2000

SEYBURN, KAHN, BESS, DEITCH &  
SERLIN, P.C.  
BY: GORDON S. GOLD (P14087)  
Co-Counsel for Defendant Tracey L. Deal  
2000 Town Center, Suite 1500  
Southfield, MI 48075  
(248) 353-7620

---

**PROOF OF SERVICE**

Donna Palizzi hereby certifies and says that she is employed by the law firm of CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C., attorneys for the Defendants-Appellees Wade H. Deal and Sarah J. Deal in the above-entitled cause of action, and that she did serve the following document(s) in the manner specified below:

**DOCUMENTS SERVED:**

DEFENDANTS/APPELLANTS' REPLY BRIEF and this  
PROOF OF SERVICE

**DATE SERVED:**

APRIL 1, 2004

**PERSON(S) SERVED:**

LAURIE S. LONGO, ESQ.  
Attorney for Plaintiffs-Appellees  
214 S. Main St.  
Ann Arbor, MI 48104

RICHARD A. SUNDQUIST, ESQ.  
Co-Counsel for Plaintiffs-Appellees  
500 Woodward Ave., Suite 3500  
Detroit, MI 48226-3435

BRIAN H. HERSCHFUS, ESQ.  
Attorney for Defendants-Appellees, J.A. Delaney & Co.  
and Tracey L. Deal  
37000 Grand River Ave., Suite 290  
Farmington Hills, MI 48335-2881

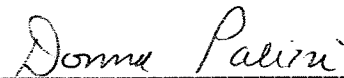
GORDON S. GOLD, ESQ.  
Co-Counsel for Defendant/Appellee Tracey L. Deal  
2000 Town Center, Ste 1500  
Southfield, MI 48075

CLERK, MICHIGAN COURT OF APPEALS  
3020 W. Grand Boulevard, Suite 14-300  
Detroit, MI 48202-6020

CLERK, WAYNE COUNTY CIRCUIT COURT  
201 C. A. Young Municipal Building  
2 Woodward Ave.  
Detroit, MI 48226

**MANNER SERVED:**

FIRST-CLASS MAIL TO ADDRESSES INDICATED  
ABOVE.



---

Donna Palizzi